85-1344

Supreme Court, U.S.
FILED
FEB 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1985

No. _____

ROBERT JULIAN TAYLOR

Appellant,

v.

H. F. MOONEY, JR., as Superintendent of the West Virginia Department of Public Safety, and THE DEPARTMENT OF PUBLIC SAFETY BOARD OF APPEALS for the discharge of Robert Julian Taylor,

Appellees.

JURISDICTIONAL STATEMENT

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THE QUESTION PRESENTED BY THIS APPEAL

DOES A 1977 WEST VIRGINIA STATE STATUTE SCHEME FOR THE DISCHARGE FOR CAUSE OF PERMANENT MEMBERS OF THE STATE POLICE FORCE VIOLATE THE PROCEDURAL MANDATES OF FOURTEENTH AMENDMENT DUE PROCESS OF LAW WHERE IT PROVIDES FOR NO PRE-DISCHARGE OPPORTUNITY TO RESPOND TO ALLEGATIONS OF THE CAUSE FOR DISCHARGE AND WHERE THE POST-DISCHARGE EVIDENTARY HEARING IS BEFORE AN AD HOC UNIFORMED PANEL OF SEVEN POLICE OFFICERS CONVENED BY THE DISCHARGING AUTHORITY WHO IS ALSO THE COMMANDER AND EMPLOYER (WITH STATUTORY POWER TO PROMOTE, DEMOTE, TRANSFER, SUSPEND OR DISMISS) OF EACH MEMBER OF THE UNIFORMED HEARING PANEL AND WHERE SUCH CONVENING COMMANDER TAKES AN ACTIVE ADVERSARY ROLE AS A PARTY AGAINST HIS DISCHARGED EX-EMPLOYEE BEFORE THE SUBORDINATE UNIFORMED HEARING PANEL?

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JURISDICTIONAL STATEMENT
THE QUESTION PRESENTED BY THIS APPEAL

(See page before Table of Contents)

OPINIONS BELOW

On November 6, 1986, the West Virginia Supreme Court of Appeals dismissed Appellant's petition for an appeal without opinion or statement of reason. A copy of the order is printed in the Appendix. The Circuit Court of Kanawha County rendered a letter opinion which is reproduced in the Appendix. The appeal board made a finding of fact and conclusion of law which is reproduced in the Appendix.

JURISDICTION OF THIS COURT

This is an appeal from a West Virginia Supreme Court of Appeals order dismissing a petition for an appeal from a circuit court decision ruling that a state statute, §15-2-6 *West Virginia Code* of 1931 as amended, did not violate the federal constitution.

The West Virginia Supreme Court of Appeals order was entered on November 6, 1985. A notice of appeal was filed

with the clerk of the West Virginia Supreme Court of Appeals on January 31, 1986.

The jurisdiction of this Court is based on 28 U. S. C. 1257(2). See also, *Cox Broadcasting Corp v. Cohn* 420 U. S. 469 (1975), and *Rohr Aircraft Corp. v. County of San Diego*, 362 E. S. 628 (1960).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution, Clause 1, reads in pertinent part: ...Nor shall any State deprive and person of life, liberty, or property, without due process of law...

§15-2-1 et. seq. of the *West Virginia Code* of 1931 as amended is lengthy. §15-2-6, is set out vervatim in the Appendix.

STATEMENT OF THE CASE

Appellant was a corporal and commander of the Paden City, West Virginia, state police detachment when he was fired by then-Superintendent Harley Mooney on January 16, 1979, after 17 years of theretofore "unblemished service" with the Department of Public Safety.[1]

Superintendent Mooney accomplished the discharge by ordering Appellant (then Corporal Taylor) to appear in his office at noon on January 16, 1979, at which time he

[1] Appellant's entitlement to his job and rank is unequivically established by §15-2-5 and 21, *W. Va. Code* of 1931 as amended. This fact was not challenged by the West Virginia Attorney General representing the Appellees below. *Compare Bishop v. Wood*, 426 U. S. 341 (1976). There this Court found that under North Carolina law, which this Court was bound by, the policeman held his position at the "will and pleasure of The City," i.e., under North Carolina law the policeman was not "entitled" to his job and the Court felt "foreclosed from making an independent examination ofthe state-law issue." Id. at 347. Under West Virginia law, Code § 15-2-21 (last paragraph) members of the Department have a "probationary period of eighteen months" after which they may appeal if they are suspended, demoted or discharged which may only be "for any of the following causes: [listing ten cause]" (first paragraph). In § 15-2-5 the act states: "The Superintendent may appoint from the membership of the Department eleven principal supervisors who shall receive the compensation and hold the

served upon Appellant Special Order #10, which discharged Appellant from the Department of Public Safety forthwith. At the same time he served upon Appellant a letter setting forth the reasons for the discharge. Appellant filed an appeal of such order with discharge as was authorized by §15-2-6 of the *W. Va. Code*. As prescribed by the same section an ad hoc board of appeals was picked by lot by Superintendent Mooney from the uniformed members of his command. The board chosen consisted of a captain, lieutenant, master sergeant, first sergeant, sergeant, trooper first class, and trooper. The board was ordered to convene by Special Order #24 and #24(a) signed by Superintendent Mooney. The captain was elected chairman of the appeals board.

A hearing was held on March 15, 16, 19 and 20, 1979, at the West Virginia State Police Academy, in Institute, West Virginia. Appellant was represented by his private attorney and Superintendent Mooney was represented by an assistant attorney general of his personal choice. Appellant's attorney was denied the opportunity to *voir dire* the members of the board. Appellant's attorney objected to the composition and conduct of the hearing as violation (among other laws) the Fourteenth Amendment of the United States Constitution. A stenographic record was made of the hearing.

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temporary rank of lieutenant colonel, major, or captain *at the will and pleasure* of the Superintendent....Any person appointed to a temporary rank...shall retain his *permanent rank*....Upon termination of a temporary appointment...the member shall be *entitled* to the *full rights and privileges of his permanent rank*." (Emphasis added.) From this it is clear that a uniformed member of the Deparment of Public Safety, after 18 months of probation, is "entitled" to remain unless he commits a specific act giving the Superintendent "cause" to demote him and only "temporary ranks" are at "the will and pleasure" of the Superintendent. In deed when a member loses a temporary rank (to which he has no "entitlement") he immediately is "entitled" to his"permanent rank." Thus, whatever may be the law in other states or before the 1977 act in West Virginia, after 1977 in West Virginia, a uniformed member of the Department of Public Safety has an entitlement not only to his job but to his permanent rank.

On March 20, 1979, the appeal board orally announced its decision to sustain the Superintendent's order of dismissal. On April 14, 1980, the appeal board issued its written findings, conclusion and order. (Reproduced in the Appendix hereto.)

Appellant filed his appeal to the Kanawha County Circuit Court as authorized by §15-2-6, West Virginia Code, by filing a "substituted Petition for Appeal from Order of an Administrative Tribunal on June 12, 1980. The Superintendent answered. The Appeal was designated Civil Case No. AP-CA-80-78. A briefing schedule was established and on June 1, 1981, the final brief was submitted. No oral argument was allowed in the appeal. No new evidence was introduced. The four volume transcript of the administrative hearing held in March of 1979 was the record on appeal. In Appellant's Substituted Petition, he specifically challenged the constitutionality of the department discharge and appeal process as mandated by §15-2-6, West Virginia Code as violating the Fourteenth Amendment to the United States Constitution. In a 43-page Brief and 38-page Reply Brief, Appellant fully argued the federal issues challenging the constitutionality of the §15-2-6, West Virginia Code, discharge and appeal scheme.

On September 7, 1984, the circuit court not having acted, Appellant sought a Writ of Mandamus from the West Virginia Supreme Court of Appeals. On November 4, 1984, a pre-emptory Writ of Mandamus issued commanding the circuit court to render a final decision within twenty days. *State of West Virginia ex. rel. R. J. Taylor v. The Honorable A. Andrew MacQueen, Judge of the Circuit Court of Kanawha County*, 322 S. E. 2nd 809 (W. Va. 1984).

On November 30, 1984, Judge MacQueen rendered a descision by letter opinion. (*See* Appendix.) On February 4, 1985, Judge MacQueen entered a final order affirming the Board of Appeals decision. (*See* Appendix.)

Appellant filed a petition for an appeal pursuant to Rule 3 of the Rules of Appellate Procedure, in the West Virginia Supreme Court of Appeals on May 6, 1985, and made an oral presentation on May 21, 1985. On July 9, 1985, Appellant's attorneys were notified by telephone that the petition had been denied. Appellant filed a supplemental petition and made another oral presentation on September 10, 1985. Appellant was advised by letter from the clerk of the Supreme Court of appeals dated November 6, 1985, that the second petition was denied. (*See* Appendix.)

We are here appealing that denial having raised issues of the constitutionality of the West Virginia statutory discharge scheme contained in Department of Public Safety Reorganization Act of 1977 at every step and in every available West Virginia forum.

REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL

In 1977, the West Virginia legislature passed the "West Virginia Department of Public Safety Reorganization Act." (*See* §15-2-1 et. seq., West Virginia Code of 1931 as amended.) §15-2-6 of the new act as codified reproduced *in toto* in the Appendix to this Jurisdictional Statement) provides for appeals of departmental transfers, suspensions, demotions in rank and discharges to *ad hoc* in-house "boards of appeals." No doubt this was a good faith effort by the legislature to give peer review of various decisions of the Departmental Superintendent that adversely affected its employees. The Act as a whole gave tenured or entitlement status to the uniformed members of the Department. (*See* footnote #1 above under Statement of the Case.)

However, it is an unfortunate irony that rather than create new rights in a fair procedure, the new act

eliminated an existing fair system[2] and, at least as to discharges, created a system wholly at odds with the fundamentals of procedural due process as taught by this Court. Although Appellant attacks the rather lengthy §15-2-6 as a whole, a cataloguing of its individual blemishes is a revealing first step.

a.) The Act does not provide for, encourage or even authorize a pre-discharge process that allows the "accused" a fair opportunity (or any meaningful opportunity) to respond to the charges that may be the "cause" of his discharge. Thus, it ignores this Court's teaching for more than a decade as most recently amplified in *Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985).* (*See also Davis v. Schere*, 468 U. S. _____ , 82 L. Ed. 2nd 139 (1984) (especially Note #10 at 82 L. E. 2nd 148.)

True the Act does not flatly prohibit such pre-discharge opportunity. §15-2-6, (fourth paragraph) states: "Within fifteen days after a member of the department has received a notice of transfer *or a statement of charges and an order of* suspension, demotion in rank or *discharge* by the Superintendent, he may appeal..." (Emphasis added.) But such language certainly would encourage the Superintendent to believe that a "statement of charges" was to be given contemporaneously with an order of discharge.

And that is exactly what happened in this case. (*See* Statement of the case.) An Administrative discharge act ought to mandate or prescribe such a pretermination opportunity to respond, not, as here, positively discourage it. See also §15-2-21, W. Va. Code of 1931 as amended. Such discouragement, when acted on, makes

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[2] In *State ex rel. Goodwin v. Bonar*, 155 W. Va. 202, 183 S. E. 2nd 697 (1971), the West Virginia Court approved the old system wherein the Governor appointed two independent persons to review the Superintendent's discharge decision and if they deadlocked then the Governor himself, the Superintendent's superior, became the tie-breaking arbiter.

the discharge unconstitutional, and certainly is a first step in making the whole of §15-2-6 unconstitutional. As Justice White emphasized in *Cleveland Bd. of Education v. Loudermill*, _____ U. S. at _____ , 105 S. Ct. at 1494:

> Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in accurate decision. Dismissals for cause will often involve factual disputes....Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.

Here Appellant disputed the factual basis for his discharge but even if the facts were true a seventeen year member of the force never before in trouble might have persuaded a decisionmaker that his negligence in not knowing that the ex-coustable riding with him had stolen from his employer the walkie talkie he carried was not grounds for outright dismissal.

b.) The Act in establishing the "peer review board" has three features that make the fundamental unfairness of a decisionmaker's decision being reviewed by his subordinates poignantly acute. First, although the selection of each board is "by lot," each new member is notified by the Superintendent and "the Superintendent shall determine whether the reasons alleged by the member [if he requests to be relieved] are sufficient cause to relieve the member of such assignment."

In other words, the Superintendent is the convenor of the quasi-courts-martial.

Second, the Superintendent is made an active party to the appeal: "The Superintendent may be represented by counsel of his choice." "In any other appeal [e. g., a discharge] the Superintendent has the burden of proof as to the charges alleged."

Third, since the appeal comes after the discharge, the board is in uniform, the appellant in mufti - a *former* peer. Of course, the ultimately important fact is that each member of the board is the superintendent's subordinate and the subordinate in a paramilitary organization. The Superintendent has the power to promote to permanent rank (§15-2-9, W. Va. Code)[3], to promote all officers and eleven supervisors who hold the rank of lieutenant colonel, major or captain "at the will and pleasure of the superintendent" (§15-2-4, W. Va. Code). He also has the power to transfer (§15-2-20), demote, suspend or discharge (§15-2-21, §15-2-6) any member of the appeal board selected to hear his case against their former peer. It is not unlike having a jury composed entirely of a plaintiff's employees.

There are actually three strands of biasing influence involved in this West Virginia statutory procedure. I will identify and briefly cover each: 1) Judging one's own case, 2) Pecuniary interest and 3) Command Influence.

The proscription against being a judge in one's own case is a doctrine of ancient lineage. It travelled under the Latin rubric, "nemo debit esse judex in propia causa." In 1610 Lord Coke declared it to be a maxim of the Common Law above Parliament as well as above the King. *D. Bonham's case*, 8 Co. 114a, 118a. *See* Bowen, *The Lion and the Throne, The Life and Times of Sir Edward Coke* 315 (1957) for an informal account of this case. In 1978, this Court declared it to be "one of the great first principals of the social compact." *Calder v. Bull*, 3 Dall. 386 (1798).

The fact that the adjudicative officers, here, were not

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[3] "The Superintendent shall promote a member to the permanent rank of trooper first class, corporal, sergeant, first sergeant, master sergeant, or lieutenant from among the top three names on the current list of eligible candidates established by the promotion evaluation board for each rank." Of course, by the same section he has the power to select the promotion evaluation board.

identical with the plaintiff-appellee but his employees, if anything, makes it worse. For if one makes "a realistic appriasal of psychological tendencies and human weakness," *Withrow v. Larkin*, 421 U. S. 35, 47 (1975), it would seem far easier to overrule oneself than one's superior. The *Withrow* case reminds us of what this case is *not* about. Appellant is *not* contending that we have here an impermissible combination of investigative and adjudicative functions. Had an independent body investigated the case, found probable cause, and then had a full trial on the merits, our case would be much weaker, as *Withrow v. Larkin* held. For judges "preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial" and this "has [not] been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the, trial is without a jury, against making the necessary determination of guilt or innocence." *Id.* at 56 In *Withrow* the court reiterated that "[n]ot only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 47 The court was careful to distinguish *Gagnon va. Scarpelli*, 411 U. S.778 (1973), and*Morrissey v.Brewer*, 408 U. S. 471 (1972). "These decisions, however, pose a very different question. Each held that when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review. . . . Allowing a decisionmaker to review and evaluate his own prior deicsions raises problems that are not present here." *Id.* at 58 n. 25.

Again, the situation here is even worse than the ones *distinguished* in *Withrow*, for the Superintendent did not review his own prior decision, his subordinates did. In one case, the combination of investigation and adjudication was narrowly upheld (5-3) where the adjudicator was not identical to the investigator but the adjudicator "was

subject to the supervision and control of officals in the Immigration Service charged with investigative and prosecuting functions." *Marcello v. Bonds*, 349 U. S. 302, 311 (1955). Of course, there are striking contrasts between *Marcello* and this case (besides "the special considerations applicable to deportation" found crucial by the Court, at 311): there the adjudicator was simply "subject to the supervision of district directors of the district to which they were assigned, as well as higher service officials, all with enforcement responsibilities" id. at 306, i.e., subject to the general supervision of people with general enforcement responsibilities; not, as here, subject to the specific supervision (Captain Lemmon, Chairman of the Appeal Board, was even subject to demotion solely "at the will and pleasure" of the colonel) of one who had specifically investigated this case, made a decision, and was a party at the hearing to appeal that decision.

But even for the hearing panel to be under the general superviser and control the job of the judge before whom enforement (a much watered down version of the bias in our case) was too much for the late Justices Hugo Black and Felix Frankfurter to bear (Justive Douglas dissented on other grounds). Black declared (at 318): "The idea of letting a prosecutor judge the very case he prosecutes or superviser and control the job on the judge before whom his case is presented is wholly inconsistent with our concepts of justice."

Closely related to judging one's own case is the doctrine against having any pecuniary interest in the case one judges.

> Every procedure which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might cause him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.

Tumey v. Ohio, 273 U. S. 510 (1927). In *Ward v. Village of Monroeville*, 409 U. S. 57 (1972), this Court applied the *Tumey* principle to invalidate a mayor's court where the fines collected from traffic offenses adjudicated there were a major part of village income, and the mayor also had "executive responsibility for village finances."

In *Gibson v. Berryhill*, 411 U. S. 564 (1973), the Court expressly applied this doctrine to administrative adjudicators. The Court affirmed the District Court's conclusion "that success in the [Optometry] Board's efforts [in hearing cases of license revocation for unethical conduct in practicing optometry as employees of a business corporation, when the Board was composed entirely of independent optometrists] would possibly redound to the personal benefit of members of the Board [by decreasing competition] sufficiently so that . . . the Board was constitutionally disqualified." *Id.* at 578.

Surely here "psychological reality" about the felt fears and pressures of adjudicating a case involving as a keenly interested party, the person who is directly responsible for one's continued tenure and promotion, makes the felt "pecuniary interest" of the adjudicators far from insubstantial. Would any judge ever fail to excuse for cause of propective juror who was the employee of one of the parties? Appellant faced an entire jury of such jurors in the hearing below.

The military nature of the Department of Public Safety suggests yet another powerful psychological influence for bias on the appeal board: command influence. In the military justice system an elaborate doctrine to protect against "undue command influence" has been established. *See* West, *A History of Command Influence on the Military Judicial System*, 18 U. C. L. A. Rev. 1 (1970) for an exhaustive study of the subject.

In spite of the existing doctrine, including specific statutory proscription of such influence (10 U. S. C. §837, Art. 37 unlawfully influencing action of court) it is still a

matter of grave concern (see, e. g., Schiesser, & Benson, *A Proposal to Make Courts-martial Courts: The Removal of Commanders from Military Justice*, 7 Texas Tech. L. Rev. 559 (1976) including proposals for legislative change). During the First Session of the 91st Congress (1969) Senator Tydings submitted a proposal for an independent Military Trial Command. In the 92nd Congress Senator Bayh submitted a similar but more extensive proposal. In explaining his reasons for introducing his bill, Senator Bayh said: "As long as the remotest possibility of undue command influence remains, we will never be able to avoid the implication - or at least the appearance - of fundamental unfairness." Cong. Rec. S2550 (daily ed.), March 8, 1972, quoted in Barker, *Command Influence: Time for Revision*? 26 UAGU (Navy) 43, 44 (1971).

The procedure prescribed by W. Va. Code §15-2-6 and used in the hearing under review is *per se* undue command influence, and a denial of fundamental fairness. To understand why this assertion is true one need understand but two facts: One, a court martial is convened by a "convening authority" who generally is a commanding officer of a large unit, size of unit dependent on the type court martial - General, Special or Summary. (In West Virginia, for example only the Governor can convene a general court martial (W. Va. Code §15-1E-3).) The commanding officer sets the whole process in motion, and then sits back like an absentee landlord. Two, it is unlawful for an accuser to convene a court-martial for the trial of the person so accused. When the ordinary convening authority is the accuser, he must refer the matter to a superior authority. 10 U. S. C. §833(b) and §823(b) (1970). Ironically only forty some pages from §15-2-6, is the West Virginia proscription against an accuser convening a court-martial. §15-1E-24, W. Va. Code of 1931, as amended.

For the convening authority to be not only the accuser,

but the intial decisionmaker, a party at the trial, and a witness is simply unthinkable. Appellant is, of course, arguing by analogy because technically this was not a court martial, nor governed by the Code of Military Justice, but the analogy could hardly be closer. If undue command influence is fundamentally unfair in the military it is fundamentally unfair here also.

Thus the conjunction of all three biasing influences is evident in the procedure established by §15-2-6: the "plaintiff"-appellee is to have his own case judged by his employee-subordinates, his "agents," who surely have a felt pecuniary interest in their job security and advancement and to whom the habit of command obedience is a way of professional life.

c) Finally, the Act does not *guarantee* a genuine *de novo* hearing. The denial of any meaningful process before discharge is exacerbated by the wording of §15-2-6, which encourages an appellant like review of an *ex parte* decision. The legislature probably intended a de novo hearing before the "appeal board" under §15-2-6, but the statutes wording and the very structure of the process established discourage such a hearing in fact. That a de novo hearing is intended is fairly inferable from the requirement that the Superintendent bear the burden of proof but the remainder of §15-2-6, *supra*, shows it to be but a word of promise to the ear, broken to the hope.

A de novo type hearing before a final decision is absolutely essential to the whole process. Even if this Court could now give us a trial de novo (impossible of course if only the cold record is used) it would not cure the

unfairness of the original denial. In *Marshall v. Jerrico, Inc.*, 446 U. S. 238 100 S. Ct. 1610 1615-16 n. 9 (1980). The Court stated:

> In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), we held that the availability of a trial de novo before an unbiased judge did not remove the constitutional infirmity in an original trial before one whose impartiality was impaired. A litigant, we said, "is entitled to a neutral and detached judge in the first instance."

If the bias of such tribunal cannot be so cured neither can the lack of a de novo hearing. West Virginia Code §15-2-6 probably contemplates a de novo hearing. It says the superintendent has the burden of proof as to the charges alleged, but it is ambiguous or, at least, subject to being misunderstood. But then in a later paragraph the Act enjoins a determination of "whether or not the superintendent's order shall be sustained." This has the sound of appellate review. Moreover, §15-3-6 constantly uses the word "appeal" (some 23 times) in referring to the process of review and uses "appeal or Hearing" (5 times) and refers to "the member making the *appeal* shall have a public ***hearing***. . . ." So its use of the wording "hearing" alone (6 times) seems to imply a hearing of the appeal. All of this suggests the review of a decision already made to determine its reasonableness. Such words are not conclusive nor is the fact the parties were called "appellant" and "appellee" at the hearing in this case conclusive (the statute does not use those terms) but it is suggestive. The form the hearing took was trial-like. Live witnesses were called, sworn and testified and a record was kept. Opening statements and closing arguments were made. But appearances are often deceiving—form masking substance. In the Court blow appeallant made a detailed argument from the hearing transcript that he did not get a de novo hearing, an argument impossible to make at this stage. However, for

purposes of this Jurisdictal Statement Appeallant will make a brief comparison of a de novo process and an appellant process and show the clear possibility for confusion in this case.

The standard of proof at a trial or de novo type review is either preponderance of the evidence, clear and convincing evidence or beyond a reasonable doubt. All imply weighing the evidence, i.e., looking at both side's case and choosing the weighter case -- often a matter of choosing the more credible of two seemingly credible cases each based on substantial evidence. On appeal, the standard of review is usually the Substantial Evidence Rule or as often put when reviewing a jury verdict, "could reasonable minds have reached the conclusion under review?" It is not a choice between two sides but the review of the reasonableness of a choice made by another. Under the substantial evidence rule -- a choice (i.e., lower decision) is reasonable if it is supported by substantial evidence. To take the simplest example: If plaintiff's witness A says X is true and defendant's witness B says X is not true, then the determination of whether or not X is true (given this as the only evidence of X) is a choice between the credibility of A and B. If decisionmaker D decides X is true having heard A and B, and if A and B are both credible, on review his decision will be affirmed even if the reviewing body would have made the opposite choice if it had been the original decisionmaker. In other words, if A and B are both credible, then either choice D would have made would be affirmed on review.

Now if D is both reviewing a decision of another decisionmaker finding X to be true (call him "sub D") and also hearing all the evidence of X (i.e. A and B's testimony) D may not know if he is to review "sub D's" choice, which he would affirm if both A and B are credible or, having heard all the evidence, make his own choice between A and B. D could easily become confused as to

his role.

Lawyers know that when it is clear that the earlier decisionmaker (subD) could not in fact have made a choice because he had only A's statement, then D has a duty to choose between A and B's testimony, and not simply determine whether or not A was credible, i.e., that "sub D's" decision was reasonable. When it is D's duty to make such a genuine choice, but he, in fact, reviews "subD's" non-choosing decision, then the adverse party (the party relying on B) has had no hearing at all.

In this case the statute surely suggested and fundamental fairness demanded that the Board of Appeals make a new choice and not review another's choice. The statute suggests it because it says the Superintendent has the burden of proof -- a trial not a review term. No one has "burden of proof" in appellant cases or under judicial review in the Administrative Procedures Act. Moreover, fundamental fairness demands it here because (a) there was no record before the Board of Appeals showing on what the former decisionmaker (Superintendent Mooney) based his decision, and (b) in fact the Superintendent made no choice at all because he had seen only one side of the case.

What we are here contending is that what the Board did was to hear the evidence and then decide the "Appeal" as if the Superintendent had heard *all* the evidence that they heard and as if he had based his decision on a choice between the conflicting witnesses.

Frankly, it is impossible to know with any confidence what the Board did in fact do. But taken all in all, they must surely have been unduly influenced by the fact that their superior had already made a decision, was still convinced of its propriety and the hearing was an "appeal" to determine if it should be "sustained." They had no legal advisor to correctly inform them of their role.

In view of the natural bias oftheir position in relation to the prior decisionmaker, the statute utterly fails to protect against the potential for a mere review as opposed to a genuine trial de novo.

APPENDIX

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APPENDIX

ORDER

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 6th day of November, 1985, the following order was made and entered, to-wit:

Robert Julian Taylor vs. H. F. Mooney, Jr., etc., et al.

On a former day, to-wit, May 6, 1985, came the petitioner, Robert Julian Taylor, by Michael S. Francis and James A. McLaughlin, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 5th day of February, 1985, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused.

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

ROBERT JULIAN TAYLOR,

Appellant,

v. AP-CA-80-78

H.F. Mooney, Jr., individually, and as Superindentent of the West Virginia Department of Public Safety, and THE DEPARTMENT OF PUBLIC SAFETY BOARD OF APPEALS for the discharge of Robert Julian Taylor,

Appellees.

ORDER

On November 30, 1984, this Court issued a letter memorandum settinf forth the Court's opinion regarding the issues in this judicial review of the administrative proceedings surrounding the discharge of appellant from the West Virginia Department of Public Safety. The pleadings, briefs, and other documents filed below raised the following issues:

1. Whether the procedures utilized by the Department of Public Safety in its discharge of appellant Taylor comported with the due process clauses of our State and Federal Constitutions. (This issue presents the sub-issue of whether W. Va. Code § 15-2-6 and § 15-2-21, which set forth the procedures for such a discharge, are constitutional under the State and Federal Due Process clauses. Appellant has not alleged, nor does it appear, that the appellees violated the provisions of these statutes.)

2. Whether the decision of the Board of Appeals sustaining the discharge, was "clearly wrong in view of the reliable, probative, and substantial evidence on the whole record." W. Va. Code § 29A-5-4 (g) (6).

For the reasons set forth in the letter of November 30, 1984, a copy of which is attached hereto, the Court finds:

A. That the procedures utilized by the Department of Public Safety in its discharge of appellant Taylor afforded him due process of law as mandated by the State and Federal Constitutions. The statutory procedures provided for by W. Va. Code § 15-2-6 and § 15-2-21 did not operate to deny appellant due process of law, and were not unconstitutional as written.

B. The Board of Appeals' decision to sustain the discharge was not clearly wrong in light of the evidence presented to the Board.

Accordingly, it is ORDERED that the decision of the Board of Appeals be affirmed, and that this action be dismissed.

The appellant objects and takes exception to the Court's findings in paragraphs A and B above, and therefore objects and excepts to this order.

Approved for entry this 5th day of February, 1985.

A. Andrew MacQueen
Judge

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
Kanawha County Judicial Building
Charleston, West Virginia 25301
November 30, 1984

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RE: Robert Julian Taylor v. H. F. Mooney, Jr.
AP-CA-80-78

Gentlemen:

For obvious reasons, this note will be as brief and to the point as I can make it. I have carefully reviewed the original hearing record, the stipulated additions, and the detailed memoranda of the parties. In addition, I have conducted independent research in virtually all areas presented by the appeal.

Based upon my review, I am of the opinion that none of the procedural assaults by the appellant to the proceedings below merit reversal. Without reciting all of the predicates for this conclusion, I draw the parties attention to the actions and decisions of the West Virginia Supreme Court of Appeals in the disciplinary proceeding involving Magistrate Kermit W. Pauley. While the final action of the Court is reflected in *IN RE: PAULEY*, _____ W. Va. _____, 318 S.E.2d 418 (1984) various other unrecorded proceedings and unreported Orders are relevent here.

In *Pauley*, the Administrative Director of the Courts, an employee of the West Virginia Supreme Court of Appeals, initiated disciplinary actions by filing a complaint alleging ethical misconduct by Mr. Pauley, a Migistrate ofKanawha County. Shortly thereafter, acting upon unverified documents submitted to the Supreme Court's delegate agency, the Judicial Inquiry Commission, the Court summarily suspended Magistrate Pauley after a brief audience with Pauley but without the opportunity for Pauley to be heard or to present evidence or information. Thereafter, the procedures established under the Rules of Procedure for the handling of complaints against Justices, Judges and Magistrates were followed. During this procedure, a post-suspension hearing was held before the Judicial Review Board. During this hearing, Pauley was afforded substantial due process rights, including a full evedentiary hearing, confrontation by witnesses, the right to counsel, and the right to present a defense by testimony and exhibits. Notably, the Judicial Review Board is composed of three Circuit Judges selected by the Supreme Court of Appeals, one Magistrate also selected by the Supreme Court of Appelas, two members of the West Virginia State Bar and one lay person. Expecting the lay person, by Constitution or Court rule all of these members are subordinates of the Supreme Court of Appeals.

Sixteen months after the original suspension, the Supreme Court of Appeals upheld its own suspension for a limited period of six months. Notably, the sixteen month period between the initial complaint and its final resolution exceeded the period of suspension by an obvious ten months.

The parallels between *Pauley* and the present case are obvious. Not only was there a prehearing suspension without the opportunity to present opposing evidence or information, but the suspension was lengthly and the final hearings and decisions were made by persons in the

"chain of command" and the Supreme Court of Appeals itself, the employer of the complaining party. Thus, based upon this and numerous other comparable precedents, the procedural deficiencies alleged by the appellant are not sustained in the record.

The final issue of consequence raised by the appellant is the question of whether the findings against him were sustained by the evidence. In this respect, it is plain that the Board of Appeals made its findings based upon clearly controverted evidence; particularly the testimony of the appellant and that of one James Otis Grove. A review of the entire record demonstrates that there was more than adequate evidence of a substantial probative nature to sustain the Board's findings. Of special interest is the fact that the Board chose to characterize substantial unlawful donduct as "neglect of duty". This mitigated characterization is nonetheless supported by the record and the reasonable inferences to be drawn from the evidence.

For the reasons articulated, the decision of the Board will be affirmed. Counsel for the appellee should prepare an appropriate Order reflecting this decision and making this letter a part of the record by reference. The objections and exceptions of the appellant should be preserved by that Order.

Sincerely,
A. Andrew MacQueen
Chief Judge

WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY
BOARD OF APPEALS
IN RE: THE DISCHARGE OF R. J. TAYLOR FROM THE DEPARTMENT OF PUBLIC SAFETY

Finding of Fact

Upon consideration of the evidence adduced at the administrative Hearings of the foregoing action on the 15th, 16th, 19th and 20th days of March, 1979, the Board finds that the following facts are true:

1. Appellant's name is Robert Julian Taylor, age 41, who resides at 2201 Lincoln Avenue, Parkersburg, West Virginia.

2. Appellant was a member of the Department of Public Safety from April 1, 1962 until his discharge on January 16, 1979.

3. Appellant held the rank of Corporal and was the Detachment Commander of the Paden City Detachment, located in Tyler County, West Virginia, from February 1, 1976 until his date of discharge.

4. The Superintendent of the Department of Public Safety, by Special Order No. 7, dated January 11, 1979, caused an investigation to be made by Lt. R. G. Fink of certain allegations of theft and misconduct by members of the Department of Public Safety in the Tyler County area.

5. After the completion of the investigation, the Superintendent of the Department of Public Safety issued Special Order No. 10, dated January 16, 1979 discharging the appellant as a member of the Department of Public Safety.

6. The appellant was served with the order of discharge and a written statement, setting forth the charges and reasons for the Superintendent's discharge of R. J. Taylor.

7. The order of discharge and the statement of charges and reasons for such discharge were served upon the

appellant by the Superintendent of the Department of Public Safety in the presence of Lt. Colonel H. C. Beverley, Chief of Field Services of the Department of Public Safety.

8. H. F. Mooney, Jr., is the Superintendent of the Department of Public Safety; Lt. Colonel H. C. Beverley is the Chief of Field Services; both were appellant's commanding officers.

9. The Superintendent, upon the timely request of the appellant and by Special Order No. 24, dated January 29, 1979, assigned the members of this Board in compliance with Chapter 15, Article 2, Code of West Virginia.

10. Pursuant to Special Order No. 24, and upon notice to counsel for the appellant and appellee, the Board met on February 1, 1979, to appoint a chairman, select a time and place for hearing and to entertain preliminary motions from counsel.

11. Upon agreement of counsel for both parties, counsel for the appellant met in the presence of the chairman of the Board of Appeals to consider maters appropriate to the conduct of the hearing. Upon agreement of counsel, and upon the motion of counsel for the appellant, the hearing was continued and rescheduled for March 15, 1979, a date suggested as acceptable by counsel for the appellant.

12. Special Order No. 10, and the accompanying letter of January 16, 1979, together with the copy of the internal investigation report, including statement of witnesses, provided sufficient specific reasons for discharge within the meaning of W. Va. Code, 15-2-21.

13. Upon the request of the appellant, First Sergeant V. N. Brackenrich was stricken from the Board for cause and First Sergeant R. P. Smith was selected by lot to replace him and assigned by Special Order No. 24A. The Superintendent, by counsel, waived any right to challenge members of the Board for cause.

14. Upon agreement of counsel, the appeal hearing previously set by the Board of Appeals at the February 1, 1979 meeting was continued from February 20, 1979 to March 15, 1979, in order to provide appellant sufficient time to seek injunctive relief.

15. Both parties waived any objection to the rescheduling of the hearing by the Chairman of the Board of Appeals, in the absence of a quorum of the Board and in opposition to the thirty-day requirement of W. Va. Code, 15-2-6.

16. The action came on to be heard on the 15th, 16th, 19th and 20th days of March 1979 at the West Virginia State Police Academy at Institute, West Virginia. There appeared the appellant, in person, and by Michael S. Francis and David Underwood, his counsel. The Superintendent was represented by Ellen F. Warder, Counsel for the Department of Public Safety. The Board proceeded to hear the testimony of twenty (20) witnesses, including the appellant. Upon consideration of the evidence in this matter, the Board finds the Superintendent of the Department of Public Safety, had just cause to discharge R. J. Taylor.

UNDERLYING EVIDENTIARY FACTS

1. On 3 November 1978, the Chief of Security of Mobay Chemical Corporation reported to the Moundsville Detachment of the Department of Public Safety the theft of four walkie-talkie radios and a battery charger.

2. The theft of the radio equipment was initially investigated by Trooper S. P. Singleton of the Moundsville Detachment of the Department of Public Safety.

3. The property, which was the subject of the Mobay report, was stolen during the period between September 18, 1978 and October 25, 1978.

4. Different portions of the property were stolen from Mobay on three separate occasions between September 18, 1978 and October 25, 1978.

5. The description of the property given the investigating officer included the type and make of the property, the individual serial numbers affixed to each of the radios, and a stamped label with the word "Mobay" and a number affixed to each piece of property.

6. The investigating officer was supplied the name of a suspect, Jerry Lee Fulks, by sources at Mobay.

7. Jerry Lee Fulks was an employee of Mobay who previously had entered a guilty plea to petit larceny, having been charged with grand larceny.

8. Jerry Lee Fulks was a frequent associate of some law enforcement officers in the Paden City area who permitted Fulks to accompany and assist them during the times they were involved in performing police functions.

9. On 3 November 1978, the investigating officer contacted Trooper W. M. Fox, of the appellant's detachment, to assist him in the investigation of the suspect, Jerry Fulks.

10. On 3 November 1978, at 1559 hours, the investigating officer sent a State Message (teletype) to all stations (detachments) in the State, listing the property reported stolen by Mobay, together with a description, including available serial numbers, of the property.

11. The Paden City Detachment of the Department of Public Safety has a teletype machine.

12. The State Message (teletype) was received at the Paden City detachment on 3 November 1978.

13. The State Message (teletype) was verbally broadcast over the Department of Public Safety's communications system from Moundsville on 3 November 1978.

14. The appellant was on duty at Paden City at the time the written transmission was communicated and the message was verbally broadcast, and the Paden City detachment duty log indicates his duty status from 0800 hours until 1800 hours on 3 November 1978.

15. The appellant and Jerry Lee Fulks made at least four visits to the residence of James Otis Grove. On each of these occasions, the appellant transported Fulks to their destination in a vehicle owned by the Department of Public Safety.

16. The appellant admits that he and Fulks were at Grove's residence in late August or perhaps the first few days of September. Grove testified that the first of a series of visits regarding the alternation, modification and repair of certain radio equipment began about this time.

17. During this visit, Grove was asked by Fulks to modify the frequency of a Motoroal H. T. 220, UHF walkie-talkie radio, carrying a Mobay Chemical Corporation label visible to anyone who handled the radio, from its existing frequency to a frequency common to the Department of Public Safety or the Department of Natural Resources. In a conversation between Fulks and Grove, Grove mentioned to Fulks that the radio was valued between $800 to $1200 and would amount to grand larcency if it were stolen. Grove described to Fulks the type of radio which would be required to accomplish his purpose.

18. The appellant was present in the room during the transaction between Fulks and Grove. The appellant did not handle the radio.

19. On a second and subsequent occasion, the appellant and Jerry Lee Fulks brought at least two radios to James Otis Grove. These two radios were Motorola, H. T. 220, VHF, walkie-talkie radios of the same type and description as those stolen from Mobay Chemical. These radios bore serial numbers, colored unit number tags but no labels indicating that the radios belonged to Mobay. These radios could not be converted to the Department of Public Safety or the Department of Natural Resources frequency. Grove was then asked to modify the radios to a frequency which was not in use in the area for the purpose

of having communications between the DPS and DNR cars. Grove agreed to make the modification for a price of $50. The appellant was present in the room during the transaction between Fulks and Grove.

20. The date of this second visit to Grove falls during the period in time (September 18, 1978 to October 25, 1978) that four radios of the same type and description were taken from Mobay Chemical Corporation.

21. Approximately four weeks later, the appellant and Jerry Lee Fulks returned to the Grove residence to pick up the radios which Grove had modified to a new frequency. The radios were tested by having the appellant drive his vehicle, with Fulks as a passenger, some distance from the Grove residence while Fulks and Grove communicated with each other with the use of the two radios.

22. In mid-November, within the week before deer season which commenced November 20, 1978, shortly prior to deer season, the two walkie-talkie radios were in use at Shiloh, Wetzel County, West Virginia. On that occasion the appellant was present. He had been working with Fulks in a department vehicle. Fulks was using the radios to communicate with a conservation officer who was riding in a vehicle owned by the Department of Natural Resources.

23. The appellant and Jerry Lee Fulks visited the residence of James Otis Grove, shortly after the Shiloh incident and brought the two walkie-talkies, which Grove had previously modified and a UHF battery charger. Fulks complained that a DNR officer was angry because the radios didn't work properly and requested that Grove modify the UHF charger to fit the VHF radios. When Grove informed Fulks that the charger was not capable of being modified for that purpose, the appellant said, "Fulks, you ignorant son of a bitch, you stole the wrong mother fuckin battery charger".

24. James Otis Grove sold the initial UHF radio, marked

with the Mobay label, to a law enforcement officer, who attended a radio amateur convention in Gaithersburg, Maryland on October 8, 1978. When the appellant learned of this he told Grove that if the radio was ever found, every one of them could be in trouble.

25. Four Motorola, H.T. 220, VHF, walkie-talkie radios and two battery chargers were recovered from Jerry Lee Fulks by Lieutenant R. G. Fink during the investigation. Two of the recovered radios carried serial numbers identical to the radios reported stolen by Mobay Chemical Company. The other two recovered radios, which bore no serial numbers, were identified by James Otis Grove as the radios brought to him by Fulks and the appellant and which he modified to a different frequency. Grove also identified the two battery chargers recovered by Fink as the battery chargers he worked on at the request of Fulks, one of which was the charger brought to him by the appellant and Fulks. Fulks admitted to Lieutenant R. G. Fink during his investigation that the four radios and the two battery chargers were taken from Mobay Chemical Corporation.

CONCLUSIONS OF LAW

The evidence taken during this hearing centered upon five (5) walkie-talkie radios and two (2) battery chargers which were alleged to have been stolen from Mobay Chemical Corporation. Of the five (5) radios and two (2) battery chargers which were the subject of testimony, three (3) radios and one (1) battery charger were directly linked to the appellant in part by his own testimony and by the testimony of James Otis Grove. Grove testified that the first radio (UHF) he was asked to adapt was marked with a Mobay Chemical Corporation label and that the second two (2) radios bore unit number tags and serial numbers when they were presented to him by Fulks in the presence of the appellant. Grove identified the two (2)

radios and one (1) battery charger by his own workmanship as the ones he had worked on for Fulks. These two (2) radios and the one (1) battery charger that were identified by Grove were recovered by Lieutenant R. G. Fink from Jerry Fulks along with two other radios, which bore the same serial numbers as the radios taken from Mobay; and a second battery charger. The four radios and the two battery chargers recovered from Fulks were of the same type and description as those stolen from Mobay. Fulks admitted to Lieutenant Fink that he had taken the radios. There was, therefore, sufficient evidence to establish that the property which Fulks brought to Grove in Taylor's presence was stolen.

The appellant acknowledged that the radios he saw in Fulk's possession were valuable pieces of equipment. He admitted that they were in Fulks' possession on at least two occasions when he transported Fulks to the Grove residence. The appellant also admitted that he made no inquiries of Fulks about the radios, their value, their origin or their intended use "because I (Taylor) know Mr. Fulks." The appellent admitted that he knew Fulks had a prior criminal record with a conviction of petit larceny. The appellant admitted that at least on three occasions he was present when Fulks had the radios in his possession or in use.

The Board is of the opinion that the charge of neglect of duty is sustained by the evidence. The appellant failed to exercise the degree of curiosity which would be reasonably expected of a police officer of seventeen years experience; he failed to inquire further of Fulks or to pursue in any manner the possible origins of the radios which he admits he saw on three different occasions; he pursued no independent investigation of the matter and he justified his lack of action on the ground that he knew Jerry Fulks. The testimony of the appellant's own witnesses characterized Fulk's as "an habitual liar and a habitual thief."

Although the Board finds that the appellant knew that these radios were stolen, such finding is not necessary in the opinion of the board to sustain the charge of neglect of duty.

The evidence sufficiently establishes that the appellant knew the property was stolen and failed to take appropriate police action. There was a conflict in the evidence between the testimony of James Otis Grove and the apellant. The Board, being present and capable of observing the demeanor of the witnesses during extensive questioning, found James Otis Grove to be a credible witness. His testimony regarding the late September visit by Fulks and the appellant was corroborated by the unequivocal testimony of Sheriff Leland Mason. Although repeatedly asked by counsel on cross-examination whether he was at the Grove residence in September, the appellant denied that he had made such a visit. The rebuttal testimony of Sherriff Mason, however, established that he had talked with the appellant on September 26th and had been told that the appellant and Fulks were going to Grove to get a radio repaired. Grove testified at considerable personal risk to himself and was candid about his knowledge and his own actions independent of the appellant and Fulks.

The basis of the conclusion that the appellant knew of the stolen character of the property are the statements made by the appellant in Grove's presence - i.e., that Fulks had stolen the wrong battery charger and that everyone could get in trouble if the radio Grove sold to the Maryland policeman was traced. Having direct knowledge of the stolen character of the property, the actions of the appellant provide more than a sufficient basis upon which to conclude the discharge of the appellant was for cause.

Therefore, based on the foregoing findings of fact and conclusions of law, it is the determination of this Board

that the Superintendent's order discharging the appellant be sustained.

April 14, 1980
Captain D. L. Lemmon
Lieutenant J. T. Gribben
Master Sergeant J. P. Fulks
First Sergeant R.P. Smith
Sergeant R.L. Rauer
Trooper First Class H. E. Dailey
Trooper Marty Allen

IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS

ROBERT JULIAN TAYLOR

vs.

H. F. MOONEY. etc. et al.

NOTICE OF APPEAL

You are given notice that Robert Julian Taylor will appeal your order of November 6, 1985, refusing his appeal from a judgement with the Circuit Court of Kanawha County to the Supreme Court of the United States under 28 U.S.C. S1257(2).

James A. McLaughlin
Of Counsel for Appellant

PROOF OF SERVICE

On January 31, 1986, James A. McLaughlin, of counsel for Julian Taylor, did personally serve a copy of the attached Notice of Appeal on the Supreme Court of Appeals of West Virginia by leaving a copy at the office of the Clerk, George Singletary. I also did serve a copy of said Notice on the Attorney General of West Virginia by leaving a copy at his office in the Capitol. Attention: Silas Taylor, Assistant Attorney General.

James A. McLaughlin
Attorney at Law

A copy of the Notice of Appeal was also served on the Kanawha County Circuit Court on January 31, 1986, but hand delivery to the clerk of that court in the courthouse in Charleston, W. Va.

James A. McLaughlin
Attorney at Law

FROM THE WEST VIRGINIA CODE OF 1931 AS AMENDED.
§ 15-2-6. DEPARTMENTAL APPEALS BOARD; APPEAL PROCEDURES.

Appeals of transfers, suspensions, demotions in rank and discharges shall be heard by boards of appeals convened pursuant to the provisions of this section. The boards shall each consist of seven members and five members shall constitute a quorum. A new board shall be convened to hear and determine each new appeal filed by a member of the department. There may be more than one board in existence at the same time meeting on different appeals. A member of the retirement board is eligible to serve on an appeals board.

The members of a board shall be one member of the department who is of the rank of trooper and six members of the department who are of one of each of the six consecutive ranks above trooper, all of whom shall be chosen by lot by the superintendent with each member to be so chosen from among all the members of each of the seven ranks. No department member may serve on an appeals board if he is a member of the same detachment as the member making the appeal. Within ten days after he has been notified of his selection and assignment to serve on a board, a member may for cause request to be relieved of such assignment. The superintendent shall determine whether the reasons alleged by the member are sufficient cause to relieve the member of such assignment. If such request is granted by the superintendent, a new board member shall be selected by lot from the same rank to replace the member who has been relieved of such assignment.

A chairman shall be selected by the members of the board. Each member of a board shall be reimbursed for all reasonable and necessary expenses actually incurred in attending meetings of a board. All expenses of a board

shall be paid from appropriations to the department.

Within fifteen days after a member of the department has received a notice of transfer or a statement of charges and an order of suspension, demotion in rank or discharge by the superintendent, he may appeal the transfer or order to an appeals board by filing a written notice of appeal with the superintendent. The superintendent shall promptly record and file each appeal, select a board, notify each new board member of his selection, and furnish to each board member a copy of the notice or order appealed from and the notice of appeal. A hearing by a board of appeals shall be held within thirty days after the superintendent has received a member's notice of appeal. At least fifteen days prior to the hearing date, the board shall notify the superintendent and the member making the appeal of the date, time and place of the hearing.

Any member of the department who makes such an appeal, as aforesaid, may be represented by an attorney or by any member of the department or retired member who is receiving benefits from the death, disability and retirement fund. The superintendent may be represented by counsel of his choice. In the appeal of a transfer, the superintendent has the burden of proof that the transfer if for the purpose of the operational needs of the department. In any other appeal the superintendent has the burden of proof as to the charges alleged. The procedure in any hearing before the board shall be informal and without adherence to the technical rules of evidence required in proceedings in courts of record. All evidence submitted to the board shall be submitted under oath. The chairman, or any member of the board, shall have authority to administer oaths to witnesses, subpoena witnesses and compel the production of books and papers pertinent to any appeal or hearing authorized by this section.

If any person subpoenaed to appear at any appeal or hearing shall refuse to appear, or shall refuse to answer inquiries propounded at the appeal or hearing or shall fail or refuse to produce books and papers which have been subpoenaed which are pertinent to any appeal or hearing authorized by this section, the board shall report the facts to the circuit court of Kanawha County or the circuit court of any county in which the hearing is being conducted and such court may compel obedience to the subpoena as though such subpoena had been issued by such court in the first instance. A person giving testimony at an appeal or hearing authorized by this section shall not be liable for such testimony given in good faith and without malicious intent.

The board shall designate a reporter for any such hearing who shall record and transcribe all of the proceedings. Upon his demand, the member making the appeal shall have a public hearing on the charges and in the absence of such demand, the board may determine whether or not the hearing should be public. Any hearing may be continued, recessed or adjourned by the board.

The superintendent shall provide reasonable space for the conduct of hearings. The charges of the reporter shall be paid by the superintendent from available appropriations. At the conclusion of the hearing, the board shall determine whether or not the superintendent's order shall be sustained. The board's decision shall be issued in writting, with copies thereof being sent by the board to the superintendent and to the appealing member by certified mail, return receipt requested. A hearing shall be conducted by at least five members of the board and the decision of the board shall be made by a majority vote of all the members of the board.

Either party aggrieved by a decision of a board of appeals may appeal the decision to the circuit court of Kanawha County within sixty days of receipt of a copy of the board's decision.

The court shall hear the appeal upon the record and determine all questions submitted to it on appeal.

In the event any decision sustaining the superintendent's order or notice is reversed upon judicial review, which reversal is final, the superintendent shall return the member to his status prior to the superintendent's order or notice without any acts or action of reprisal or reprimand, with full payment of any compensation withheld and with full credit for service between the date the superintendent issued his order or notice and the date of the final judicial decision reversing the decision of the board. (1919, Ex. Sess., c. 12, § 23; Code 1923, c. 19, § 23; 1972, Ex. Sess., c. 3; 1977, c. 149; 1979, c. 97; 1984, c. 157.)

Submitted by:

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Of counsel to Appellant.